IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8954 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LALJI SHAMJI KUHADA

Versus

PORBANDAR NAGARPALIKA

Appearance:

1. Special Civil Application No. 8954 of 1992

MR PH PATHAK for Petitioner No. 1

MR DG CHAUHAN for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 19/01/2004

ORAL JUDGEMENT

Heard learned advocate Mr. Pathak for the petitioner and D.G. Chauhan, learned advocate for the

respondent Nagarpalika. In this petition, the petitioner is praying to direct the respondent to regularize his services with effect from the date on which the services of his juniors have been regularized by the respondent as a Fireman and to grant all consequential benefits including arrears with interest thereon at the rate of 18 per cent p.a. and to continue the petitioner as a daily wage employee after his reinstatement and for holding that the respondent is not justified in continuing the petitioner as a daily wage employee after his reinstatement in service in light of the regularization of the services of the persons junior to him and for holding that it is a clear case of pick and choose policy. In substance, the petitioner is praying to direct the respondent to regularize his services on the basis of the award made by the Industrial Tribunal, Rajkot against the present Nagarpalika. Copy of the said award in Reference (IT) no. 28 of 1989, 139 of 1990 and 142 of 1990 is annexed by the petitioner at page 24 of the compilation.

During the course of hearing, it was submitted by the learned advocate Mr. Pathak that the workmen covered by the award made by the tribunal in aforesaid references were similarly situated persons and all the workmen covered by the said award have become permanent as per the award made by the tribunal on 21st May, 1993 and they are getting their salary in the scale and other service benefits. He submitted that the petitioner is also a similarly situated person and the respondent has regularized the services of the workmen on the basis of the said award who were junior to the petitioner. He submitted that the tribunal has passed the said award on the basis of the Government Resolution dated 17.10.1988. He further submits that the petitioner is satisfying all the conditions as incorporated by the tribunal in the award to get the regularization and even the services of the employees junior to the petitioner have also been regularized and, therefore, the petitioner is entitled for the same benefit on the basis of the said award based on the Government Resolution dated 17.10.1988. He also submitted that the said award made by the tribunal was accepted by the respondent and it was not challenged before the Higher Forum. Thereafter, the award was implemented by giving benefit of regularization in favour of those workmen who were junior to the petitioner and, therefore, the petitioner is entitled for the same benefit at par with those workmen covered by the said award based on the GOVERNMENT RESOLUTION dated 17.10.1988. Learned advocate Mr. Pathak submits that the services of the petitioner were terminated in the

year 1984 and while he was facing termination, while he was out of service, during that period, some of the daily rated employees of the respondent Nagarpalika raised industrial dispute through union wherein similar demand was raised by the workmen for regularization of their services on the basis of the GOVERNMENT RESOLUTION dated 17.10.1988 wherein the tribunal made award after considering the submissions made by the parties before it.

As against that, learned advocate Mr. D.G.Chauhan appearing for the respondent has vehemently submitted that the recovery application no. 13 of 1993 was filed by the petitioner and the said recovery application was withdrawn by the petitioner on 18.9.1995 while accepting the amount offered by the respondent. He also submitted that at present, no posts are available in the respondent establishment. He submitted that the petitioner is having alternative remedy before the tribunal. If he wants regularization of his services, he should approach the machinery provided under the ID Act, 1947 which can appropriately deal with and decide the disputed questions of fact. According to his submission, the petition is involving disputed questions of fact which cannot be appropriately dealt with and decided by this Court and, therefore, no relief can be granted in favour of the petitioner and, therefore, the petition is required to be dismissed with heavy costs.

I have considered the submissions made by the learned advocates for the parties. Annexure-A page 8 is the order dated 6th October, 1990. As per the said order, wherein the respondent Nagarpalika has reinstated the petitioner in service in view of the award made by the Labour Court, Rajkot in Reference No. 498 of 1985. Earlier, his services were terminated on 30th September, 1984. The labour court granted reinstatement with continuity of service with full back wages for the intervening period from 30.9.1984 and that award was challenged by the respondent Nagarpalika by filing special civil application no. 6815 of 1990 and that challenged had failed and thereafter, the petitioner was reinstated in service as daily rated fireman and he was paid the amount of back wages on the basis of the daily wages received by him prior to termination of his services as a daily rated employee. Thus, in view of this award of reinstatement of the petitioner with continuity of service with full back wages for the intervening period, right from the date of his joining till this date,the petitioner is in continuous service without any break. I have also considered the award made

by the tribunal in aforesaid references for regularization of the services of the workmen. The tribunal after considering the rival submissions of the parties, came to the conclusion as per page 37 that the workmen who are working as daily rated workmen are entitled for the regularization in the Nagarpalika in the following manner:

"Having given due consideration to all the aspects, this tribunal feels that regularization should be in the following manner:

(1) Seniority and attendance list prepared by the first party shall be conclusive and final, for seniority.

(2) Regularization would be effective on completion of two years from the date of entry in service but the effective date for financial gain and benefit could be 15.8.92.

(3) All such persons who complete period of 10 years (minimum 2880 days) on or before 15.8.92 shall be made permanent on 15.8.92, and that all such persons who complete 10 years after 15.8.92 shall be made permanent as from the date when they complete 10 years.

(4) Persons who complete such 10 years before 15.8.92 would be entitled to increments which being notional in character, would commence from completion of 10 years from the date of entry and until 15.8.92, shall earn next increment in cash. Persons who complete such 10 years on or after 15.8.92 shall be entitled to earn such increments in cash.

(5) Persons who have not completed 10 years of service on 15.8.92 but whose services are regularized as per term (2) above, shall be paid fixed basic pay (minimum of scale) and allowances payable to regular workers.

(6) All such employees who have no requisite qualifications as per rules, shall attain such qualifications, as early as possible and until they attain such qualifications, shall not be entitled to any increment but shall be entitled to minimum of the time scale and allowances.

(7) That on attaining such qualifications, the employee shall earn all increments in the year when they attain qualifications but shall

not be entitled to arrears of past increments.

(8) Birth Certificate vaccination certificate, school certificate and in absence of all, certificate of the civil surgeon, Porbandar shall be final to reckon the age of retrenchment as per rules.

(9) The pay (inclusive of increments, if any) of all the employees should be fixed on 15.8.92 in the scale of regular employees with condition that the pay of no worker shall be more than the minimum that junior most permanent staff draws on such date.

(10) The arrears of pay and allowances from 15.8.92 until publication of this award will be paid in three installments i.e. first instalment of 20 per cent on or before 15.8.93, second instalment of 30 % on or before 31.10.93 and the third instalment of 50 % on or before 31.3.94 wherefrom the amount of any nature due and payable to the Nagarpalika shall be first deducted.

(11) Dadiyas who are engaged on part time basis are declared disetitled to regularization, but shall be entitled to pay and dearness allowance only in proportionate to hours of work attended by them vis a vis the regular Dadiyas, if any.

(12) The workers recruited after 1.10.88 are declared disentitled to any regularization, as prayed for.

(13) All such persons who have left, either full time or part time service or who have been absorbed in regular scale are also declared disentitled to any relief.

(14) Regularization of the workers would not affect in any manner the seniority of regular staff already on the roll of Nagarpalika as on the date of these references."

Thus, on the basis of the Government Resolution dated 17.10.1988, the tribunal has fixed 14 conditions for regularization of the services of the daily wagers those who were the concerned workmen in the said references pending before the tribunal at the relevant

time. The petitioner is seeking directions against the respondent about regularization of his services on the basis of the award as aforesaid made by the Tribunal based on the Government Resolution No. 17.10.1988. It is his grievance that the persons who were junior to him have been regularized on the basis of the said award and, therefore, he is entitled for regularization. In view of this, according to my opinion, the respondents are required to be directed to consider the case of the petitioner for regularization as per the award made by the tribunal on the basis of the Government Resolution dated 17.10.1988 and to regularize his services provided he is satisfying the requirement laid down by the tribunal which are reproduced as above.

As regards the contention raised by the learned advocate Mr. Chauhan about the non availability of post, I am of the opinion that if the respondent has regularized the services of the employee junior to the petitioner in the same post, as per the award, then, the petitioner is entitled for the similar treatment and his case on that basis is required to be considered positively by the respondents and in view of that and also being a State authority, Nagarpalika has to consider the case of the petitioner and, therefore, non availability of the post cannot be accepted and the same is rejected and they have to extend the benefit of regularization in favour of the petitioner if the petitioner is satisfying the conditions incorporated in the award by the tribunal. Considering the mandate of Article 14, Award of the tribunal in the aforesaid reference and the provisions of the Government Resolution dated 17.10.1988, according to my opinion, if the petitioner is otherwise satisfying the conditions incorporated in the award, then the respondents should positively consider his case for regularization on that basis and being a State authority, it is the duty of the Nagarpalika to comply with the award in favour of the petitioner as the petitioner was similarly situated person who was in continuous service. He is in service since long. In 1984, his services were terminated wherein reinstatement was granted in his favour by the labour court with continuity of service as well as the back wages for the intervening period. In view of that, it cannot be said that he is not in continuous service.

Similarly, the contention raised by the learned advocate Mr. D.G. Chauhan that the petition is involving disputed questions of facts which cannot be appropriately dealt with and decided by this court in this petition also cannot be accepted. simply on the

ground that now there is no dispute as regards date of joining of service of the petitioner, the post on which the petitioner was working and the salary received by him from the date of his joining till this date. All these facts are not in dispute. These are the facts of record and, therefore, this court can direct the respondent Nagarpalika to pass appropriate order considering the record of the Nagarpalika and in view of that, the question of disputed questions of fact would not come in the way of this court.

As regards the contention raised by the learned advocate Mr. Chauhan that all the appointments were made in accordance with the recruitment rules, this Court is of the view that the tribunal is not bound by such rules when the respondent Nagarpalika is exploiting the poor daily rated workman who were working as daily rated workmen since long without getting the benefit of regular employment. In this regard, few observations made by this Court in the matter of Kalol Municipality versus Shantaben, reported in 1993 (2) GLR page 997 are relevant. Same are, therefore, reproduced as under:

"15. Here reference may be made to an unreported decision of Division Bench [Coram : J.B.Mehta, J. & T.U.Mehta, J. as he then was] of this Court in the case of Savarkundla Municipality in Special Civil Application No.351 of 1976 decided on April 26, 1976. In that case dispute was raised on behalf of 46 daily rated safai Kamdars claiming similar benefits as given to other permanent workmen. The Tribunal found that all the 46 workmen had completed more than 240 days of service, but gave direction to the Municipality to confer benefit of permanency to 30 daily rated workmen, and also directed the Municipality to revise its set up of 105 workmen by increasing its strength to 135. This part of the award was challenged before this High Court inter alia contending that the Tribunal had no jurisdiction to pass such award in view of the provisions of Section 271 of the Municipal Act. Negativing the contention the Division Bench observed as follows :

"These provisions of the Municipal Act operate in a totally different field when the Municipality as an employer unilaterally wants to lay down the service conditions of its employees. Those provisions would have no operation

where the industrial adjudication arises under a reference made by the Government under the Industrial Disputes Act, 1947 where on such an industrial dispute the Tribunal has jurisdiction to revise the old service conditions, statutory or otherwise, and to make new service contracts for the benefit of the employees in so far as it is just and proper for the industry and it must resolve such an industrial dispute. Therefore, the industrial adjudication always operates in this special field and accordingly, when such service conditions are altered by a legal industrial settlement or award, in those cases the provisions of the Municipal Act which provide for a voluntary fixation or alteration of the service conditions at the instance of the employer would not be applicable."

The Division Bench further observed that on publication of the award in Government Gazette it becomes final and binding to the parties as provided under Sec.17A of the I.D.Act. The Division Bench also observed that the employer could not contend that it ha its difficulties under the Municipal law, because the Municipal Law would apply when the Municipality on its own without any industrial settlement or adjudication by the Tribunal unilaterally wants to change its service conditions by framing proper rules under that law.

16. In the case of Natvarlal V. Patel v. Municipality of Vadodara, reported in [1965] VL GLR 189, the question arose as to whether the settlement arrived at between the workmen and the Municipality in conciliation proceedings would be binding upon the Municipality or not. It was contended that unless the settlement was approved by the Commissioner as provided under Sec.46[a] of the Bombay District Municipal Act, 1901, it would not be binding to the Municipality, in as much as the settlement altered the existing rules [Sec.46 [a] of the Bombay District Municipal Act, 1901 was analogous to Section 271 of the Municipal Act]. Negativing the contention the Division Bench observed that the Municipal Act does not deal with the sphere of industrial

dispute which is occupied by the I.D.Act. Initially when the first contract of employment was made or the initial rules were made the matter would be governed by the Municipal Act. After the workmen raised industrial dispute for changing their existing conditions of employment, the matter would e entirely governed by the I.D.Act which provides for settlement of industrial disputes by changing, modifying or altering the existing conditions of service whether under a contract or under a rule. Once the dispute is raised the matter would be governed by the Industrial law. Thereafter the Division Bench has observed as follows :

"The two fields are thus totally distinct and the two Acts operates in different fields. The Labour Court was, therefore, obviously in error in coming to the conclusion that when an industrial settlement was arrived at, what was sought to be done was an alteration of the Municipal Rules. Whether the settlement was arrived at was required by law will have to be examined only from the provisions of the Act and not by recourse to Sec.46 of the Municipal Act which deals with alternation of Municipal Rules and which does not deal with any industrial dispute."

17. Reference may be made to a decision of the Supreme Court in the case of Baroda Borough Municipality v. Its Workmen, reported in AIR 1957 SC 110 [At the relevant time Baroda Municipality was being governed by the provisions of the Bombay Municipal Boroughs Act, 1925]. The dispute arose as to whether the workmen employed in the power house section in the Municipality could claim bonus or not. It was contended that Sec.58 of the Bombay Municipal Boroughs Act, 1925 dealt with the rule making power of the Municipality and proviso [a] to the Section laid down that no rule or alteration or recision of a rule made shall have effect unless and until it has been approved by the State Government. It was contended that there was no existing rules with regard to payment of bonus to Municipal employees and therefore direction would not be given by the Labour Court or the Tribunal for payment of bonus. Repealing the contention the

Supreme Court in para-13 of the judgment held as follows :

"We cannot accept this argument as correct. The demand for bonus as an industrial claim is not dealt with by the Municipal Act; it is dealt with by the Industrial Disputes Act, 1947. Therefore, it is not a relevant consideration whether there are provisions in the Municipal Act with retard to payment of bonus. The provisions of the Municipal Act are relevant only for the purposes of determining the quality or nature of the Municipal property or fund; those provisions cannot be stretched beyond that limited purpose for defeating a claim of bonus."

18. Thus, the view which we are taking is in conformity with the settled legal position as per the decisions of this Court in the case of Savarkundla Municipality [supra] and in the case of Natvarlal V. Patel [supra] and also the decision of the Supreme Court in the case of Baroda Borough Municipality [supra]. No other contention is raised. There is no substance in the petition. Hence the petition is liable to be rejected."

Thus, in view of the observations made by the Division Bench of this Court in the matter of Kalol Municipality (supra), the tribunal is not bound by any service rules; on the contrary, the tribunal is having power to change the contract, impose new service conditions and can also vary the conditions of service. In view of that, the contention in that regard raised by the learned advocate Mr. Chauhan is rejected while keeping in view the fact that the award made by the tribunal directing the Nagarpalika to regularize the services of the workmen has been accepted by the Nagarpalika.

I have considered these aspects as well as the submissions made by the learned advocates for the parties. I have also perused the award made by the tribunal. According to my opinion, the case of the petitioner is similar to the workmen covered by the said award dated 21st May, 1993 which is relating regularization of the services on the basis of the

GOVERNMENT RESOLUTION dated 17.10.1988. It is not the case of the other side that the petitioner is not similarly situated workman. The tribunal has granted the benefit of regularization on the basis of the GOVERNMENT RESOLUTION dated 17.10.1988 in favour of the daily rated employees and, therefore, according to my opinion, the respondent Nagarpalika being the State authority is bound to consider the case of the petitioner for regularization on the basis of the award made by the tribunal without having or raising any technical stand or contention.

In view of these facts, as regards the contention of Mr. Chauhan about the availability of an alternative remedy, according to my opinion, no useful purpose would be served by now after a period of about eleven years by asking the petitioner to raise the industrial dispute for redressal of his grievance. I am, therefore, considering that most of the facts are not disputed by the Nagarpalika namely date of joining of the petitioner, the post on which the petitioner was working and the salary received by him from the date of his joining till this date. Therefore, in the peculiar facts and circumstances of the present case, the contention about availability of an alternative remedy now, after a period of eleven years cannot be accepted by this Court. Once, the petition is admitted by the Court, then, ordinarily, the court cannot consider the availability of an alternative remedy and cannot dispose of the petition on such ground. Once when the matter has been admitted, then, question of having alternative remedy is out of question. Whether the petition can be entertained or not if the alternative equally efficacious remedy is available is the discretion of the Court. While exercising the powers under Article 226 and/or 227 of the Constitution of India, High Court can entertain a writ petition even if the alternative remedy is available if the facts and circumstances of of the case are so peculiar. Therefore, it is a rule of convenience being followed by this Court so that this court may not be required to exercise extra ordinary jurisdiction under Article 226/227 of the Constitution of India in each and every matter and it is not a rule of compulsion that if the alternative remedy is available, then, the petition cannot be entertained by this Court. Further, merely because the alternative remedy is available, it cannot be said that it is not maintainable. It is for the court to entertain it or not considering the availability of an alternative remedy in light of the facts of each case. This aspect has, in detail, been considered by the Division Bench of this Court in the matter of KS Joy versus IIM & Ors. reported in 1994 (1) GLR page 57. Therefore, in view of the peculiar facts and

circumstances of the present case and also in view of the principles laid down by the Division Bench of this Court in the matter of KS Joy (supra), this contention raised by the learned advocate Mr. Chauhan is rejected.

Therefore, in the interest of justice, this Court will direct the respondent Nagarpalika to examine the case of the present petitioner for regularization of his services on the basis of the directions issued by the Industrial Tribunal, Rajkot against the present Nagarpalika. Copy of the said award in Reference (IT) no. 28 of 1989, 139 of 1990 on date 23.5.1993 as referred to hereinabove and thereafter to grant benefit accordingly in favour of the petitioner and if post in question is not available for regularizing his services, he can be posted on any post where the vacancy is available as per the requirement of the respondent Nagarpalika.

Accordingly, this petition is allowed. Respondent Nagarpalika is directed to examine the case of the petitioner for regularization of his services in view of the directions issued by the tribunal while considering the conditions prescribed by the tribunal as referred to hereinabove in its award dated 23.5.1993 in Reference (IT) no. 28 of 1989, 139 of 1990 and after examining the case of the petitioner, it is further directed to the respondent Nagarpalika to grant benefit accordingly to the petitioner and if any arrears is required to be paid, same is required to be paid as per the directions of the tribunal within three months from the date of receipt of copy of this order. Rule is made absolute in terms indicated hereinabove with no order as to costs.

[H.K. Rathod,J.]

Vyas